UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

Wisvest-Connecticut, LLC Docket No. EL03-11-003
v.
ISO New England, Inc.

ORDER DENYING REHEARING

(Issued September 10, 2003)

1. This order denies requests for rehearing of the Commission's June 6, 2003 order in this proceeding,[1] in which the Commission modified and accepted a compliance submittal filed jointly by the New England Power Pool Participants Committee (NEPOOL) and ISO New England, Inc. (ISO NE). The compliance submittal amended the NEPOOL Market Rules and Procedures (MRPs) to end ISO-NE's practice of assessing deficiency penalties on market participants who inadvertently erred in their notifications to ISO-NE of existing contracts covering the participants' monthly Installed Capacity (ICAP) requirements so long as the inadvertent errors did not jeopardize pool reliability. Our action benefits customers by protecting the finality of final account settlements and by fostering an orderly ICAP market.

Background

2. On October 11, 2002, Wisvest-Connecticut, LLC (Wisvest) filed a complaint with the Commission that ISO NE had wrongly assessed an ICAP deficiency charge for which Wisvest was ultimately responsible. Wisvest had failed to notify ISO-NE in timely fashion of a May 2002 ICAP sales contract that transferred ICAP from Wisvest's account to another entity's account. However, the lack of notification did not affect ISO-NE's knowledge of the total ICAP available to it that month. Wisvest's remonstrations to ISO-NE over the assessment of the deficiency charge were met with the response that the

[1] Wisvest-Connecticut, LLC v. ISO New England, Inc., 103 FERC ¶ 61,302 (2003) (June Order).

independent system operator was without authority to accept untimely ICAP submissions, and that it was following Commission directives.[2]

3. On December 26, 2002,[3] the Commission found that ISO-NE was strictly enforcing the ICAP market within the limitations of the MRPs. The Commission recognized that, because the ICAP MRPs did not provide for failure to notify the ISO of ICAP contracts, ISO-NE had little alternative but to consider such reporting failures as deficiencies. However, because the ICAP had been purchased in advance of the monthly supply period and was callable by ISO-NE, with no adverse impact on system reliability, the Commission granted Wisvest's complaint. To implement this ruling for future administration of the ICAP market, the Commission also directed NEPOOL and ISO-NE to submit a compliance filing to amend the MRPs by addressing the consequences of a participant's failure to notify ISO-NE of existing ICAP contracts where pool reliability was not jeopardized.[4]

4. On February 24, 2003, NEPOOL and ISO-NE filed the requisite compliance submittal, which the Commission modified and accepted in the June Order. The compliance submittal revised MRP 11 by adding a new Section 11.2.4 stating that ISO-NE would not recognize late bilateral ICAP contracts except for those falling under the exceptional circumstances provisions of new Appendix E to MRP 11. New Appendix E specified the situations that would qualify for exceptional circumstances. It also proposed a one-time retroactive relief period during which ISO-NE would revise the assessment of ICAP deficiency charges of qualifying market participants. The retroactive relief period would start from August 2000, when NEPOOL had reinstituted ICAP deficiency charges.

5. In the June Order, the Commission rejected the proposed retroactive relief period. The December Order had not included such retroactive relief, which would disturb the finality of past ICAP transactions by opening the books on finally-settled months. The June Order therefore restricted eligibility for revision of ICAP deficiency assessments to those months in which the three-month

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[2] ISO-NE referred to the Commission's "Cure Period Orders" that prohibit participants from curing ICAP deficiencies by entering into bilateral contracts after the supply period. See ISO New England, 96 FERC ¶ 61,234 (2001), 97 FERC ¶ 61,212 (2001), and 98 FERC ¶ 61,103 (2002).

[3] 101 FERC ¶ 61,372 (2002) (December Order).

[4] 101 FERC ¶61,372 at 62,551-52.

window for participants to request adjustments to their ICAP bills had not finally closed by December 26, 2002, the issue date of the December Order.[5]

Requests for Rehearing

6. Requests for rehearing of the June Order were filed by intervenors American National Power, Inc (ANP), and, jointly, by Select Energy, Inc., Calpine Eastern Corporation, and Calpine Energy Services, L.P. (together, Calpine). PPL EnergyPlus, LLC and PPL Wallingford Energy LLC (together, PPL) moved to intervene out-of-time and to request rehearing. PPL stated as reason for its lateness that it had expected the Commission to accept the proposed compliance submittal without modifying the enlarged relief period, and that the Commission's rejection of that proposal prevents retrospective corrections for PPL of ICAP deficiency charges approximating $1.2 million.

7. The sole issue raised on rehearing is whether the Commission correctly rejected NEPOOL's and ISO-NE's proposal for retroactive revision of ICAP accounts back to August 2000. The arguments advanced in support of retroactivity are: (1) the Commission's action in permitting relief only for the months where ICAP accounts had not finally settled by December 26, 2002 (April, May, August, and September through December 2002) makes an arbitrary time period that leads to inconsistent results for similarly situated participants; (2) retroactive application of the revised MRPs will give participants that acted in good faith and did not attempt to manipulate market rules the same opportunity as Wisvest to avoid unduly burdensome penalties; (3) 82 percent of the NEPOOL participant voting shares supported relief back to August 2000; and (4) because deficiency penalty collections are allocated across all satisfied ICAP obligations, the impact on the recipients of those collections is very small compared to the large magnitude of the penalties paid by the parties seeking retroactive relief, and this would be a one-time adjustment.

Discussion

Procedural Matter

8. We will deny PPL's motion for intervention out-of-time. Under Rule 214(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d)(1) (2003), the movant must show good cause for filing late interventions. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting

[5] 103 FERC ¶ 61,302 at PP 18-21.

late intervention may be substantial. Thus, movants bear a high burden to demonstrate good cause for granting such late intervention. The Commission finds that PPL has not met that burden. The issues in this proceeding were apparent prior to issuance of the June Order on the compliance filing, and PPL had actual knowledge of them. Consequently, PPL is not a party to this proceeding and we will not consider its request for rehearing.[6] Nevertheless, PPL's arguments will not go unaddressed because ANP and Calpine raise substantially the same arguments.

Retroactive ICAP Adjustment

9. We will deny ANP's and Calpine's requests for rehearing. Commission and court precedents hold that retroactivity is not authorized when a new rule is substituted for an old rule that was reasonably clear so that the settled expectations of those who had relied on the old rule are protected.[7] Under the former MRP-11, ISO-NE assessed deficiency charges for inadvertent and harmless ICAP reporting mistakes. Under the revised language of MRP-11.2.4 and new Appendix-E, which the Commission modified and approved, ISO-NE no longer does so. Revised MRP-11 is a distinct change, and therefore does not qualify for retroactive application. We will protect the settled expectations of the entities who acted under ISO-NE's application of the market rules that were in effect, i.e., the former MRP-11, and will not require re-opening of accounts back to August 2000.

10. We are not persuaded by the argument that, unless ICAP adjustment is made retroactive to August 2000, we are treating similarly-situated entities differently. All entities with open monthly ICAP accounts are eligible for re-

[6] See, e.g., Midwest Independent Transmission System Operator, Inc., 103 FERC ¶ 61,207 at P 15 (2003); Pennsylvania-New Jersey-Maryland Interconnection, 103 FERC ¶ 61,170 at P 21 (2003). See also North Baja Pipeline LLC, 99 FERC ¶ 61,028 (2002).

[7] See Williams Natural Gas Co. v. FERC, 3 F.3d 1544, 1553-55 (D.C. Cir. 1993) (fairness dictates that rules not be retroactively applied when they upset settled expectations). See also San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services Into Markets Operated by the California Independent System Operator Corp. and California Power Exchange, 100 FERC ¶ 61,235 at P 5 (2002) (retroactive application produces inequitable results); California Independent System Operator Corporation, 89 FERC ¶ 61,229 at 61,686 (1999), order on reh'g, 90 FERC ¶ 61,315 at 62,043 (2000) (retroactive application of changed methodology requires Commission intent of retroactivity).

calculation of their deficiency charges. All entities, including Wisvest, whose monthly accounts have finally settled are ineligible.

11. We are unpersuaded by the arguments that a large percentage of NEPOOL voting shares support retroactive ICAP adjustment and that the financial impact on each participant may be small. Even when customer support is unanimous, the Commission retains the responsibility of making an independent judgment.[8] That the financial impact of a retroactive ICAP adjustment may be small is not relevant.[9] As we stated previously, the Commission will not upset the ICAP market participants' reliance on the finality of the months that have already settled under MRP 18.[10]

The Commission orders:

(A) The requests for rehearing filed by ANP and Calpine in this proceeding are hereby denied.

(B) The motion to intervene out-of-time filed by PPL is hereby denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

[8] See, e.g., Missouri Public Service Commission v. FERC, 337 F.3d 1066 (D.C. Cir. 2003), citing Laclede Gas Co. v. FERC, 997 F.2d 936, 946 (D.C. Cir. 1993) and Tejas Power Corp. v. FERC, 908 F.2d 998,1003 (D.C. Cir. 1990).

[9] Cf. Northern Indiana Public Service Co., 66 FERC ¶ 61,213 at 61,488 (1994) (jurisdiction applies despite little amount of money at issue).

[10] See Section 18.5 of MRP 18. See also Section 5.3 of Attachment N to the NEPOOL Open Access Transmission Tariff, which similarly limits review of billing disputes to three months.